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No. 89-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WILMA L. ARGUBRIGHT, Individually and as Next Friend of KURT ARGUBRIGHT, a Minor, and as Personal Representative of the Estate of JAMES ARGUBRIGHT, Deceased, and MARIE PAULE KERCKHOF, Individually and as Personal Representatives of the Estate of PETER J. KERCKHOF, Deceased, *Petitioners*

v.

BEECH AIRCRAFT CORPORATION, *Respondent*

Brief in Opposition

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36 pp

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals for the Fifth Circuit, in this diversity case, properly determined the substantive tort law of the State of Texas?
2. Whether the decision of the Court of Appeals for the Fifth Circuit violates the Seventh Amendment of the United States Constitution?

LIST OF PARTIES

1. Wilma L. Argubright, Individually and as Next Friend of Kurt Argubright, a Minor, and as Personal Representative of the Estate of James Argubright, Deceased.
2. Kurt Argubright.
3. Marie Paule Kerckhof, Individually and as Personal Representative of the Estate of Peter J. Kerckhof, Deceased.
4. Counsel: Law Offices of Windle Turley, P.C.
   Dallas, Texas.
5. Beech Aircraft Corporation.[1]
6. Counsel: Cowles & Thompson, P.C.
   Dallas, Texas.

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[1]Pursuant to Rule 28.1 of the rules of this Court, Respondent presents the following list of parent, subsidiary, and affiliated corporations: Raytheon Company – parent corporation of Beech Aircraft Corporation; Beech Acceptance Corporation, Inc. – subsidiary of Beech Aircraft Corporation; Beech Aerospace Services, Inc. – subsidiary of Beech Aircraft Corporation; Beech Holdings, Inc. – subsidiary of Beech Aircraft Corporation; Beechcraft East-Hanscom – subsidiary of Beech Aircraft Corporation; Beechcraft East, Inc. – subsidiary of Beech Aircraft Corporation; Beechcraft West-Fresno – subsidiary of Beech Aircraft Corporation; Beechcraft West-Hayward – subsidiary of Beech Aircraft Corporation; Beechcraft West-Ontario – subsidiary of Beech Aircraft Corporation; Beechcraft West-Van Nuys – subsidiary of Beech Aircraft Corporation; Hangar One, Inc. – subsidiary of Beech Aircraft Corporation; Hartzog Aviation, Inc. – subsidiary of Beech Aircraft Corporation; Hedrick Beechcraft-Houston – subsidiary of Beech Aircraft Corporation; Indiana Beechcraft, Inc. – subsidiary of Beech Aircraft Corporation; Target Missile Flight Service – subsidiary of Beech Aircraft Corporation, Inc.; Travel Air Insurance Company (Kansas) – subsidiary of Beech Aircraft Corporation; Travel Air Insurance Company, Ltd. – subsidiary of Beech Aircraft Corporation; and United Beechcraft, Inc. – subsidiary of Beech Aircraft Corporation.

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WILMA L. ARGUBRIGHT, Individually and as Next Friend of KURT ARGUBRIGHT, a Minor, and as Personal Representative of the Estate of JAMES ARGUBRIGHT, Deceased, and MARIE PAULE KERCKHOF, Individually and as Personal Representatives of the Estate of PETER J. KERCKHOF, Deceased, *Petitioners*

v.

BEECH AIRCRAFT CORPORATION, *Respondent*

Brief in Opposition

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Beech Aircraft Corporation respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion, which is reported at 868 F.2d 764.

A. STATEMENT OF THE CASE

This diversity, personal injury case was presented to the Fifth Circuit on the basis that the district court erred in refusing to grant Respondent's Motion for JNOV. This

motion urged that there was no evidence to support the jury finding that Respondent had a duty to give an instruction to position and lock the aircraft seat. This is a case that turned upon the analysis of the particular facts presented to the jury. The discussion of the record presented in the Petition for Writ of Certiorari is incomplete and the evidence is discussed out of context.

1. History of the Aircraft:

In 1962, Beech began manufacturing a series of general aviation aircraft called the "Musketeer." (Tr. 25:11-13.) The plane included a unique seat-lock system that was different from any other general aviation aircraft. (Tr. 544:7-8.) Despite the fact that thousands of the Musketeer planes were in operation, there were no incidents of any kind relating to the positioning and locking of the seats. (Tr. 210:16-21; 405-406.) The aircraft operated safely using its original 1968 instruction manual and the seating mechanism in question. (*Id.*) There had been no claims, accidents, or allegations that the seating system and/or instructions were defective. (Tr. 406:5-11.)

The aircraft manufacturers that experienced problems with their seating systems had utilized seating systems that did not include a locking mechanism like the Beech aircraft. (Tr. 409:11-14.) The Musketeer seat system used a Teflon block instead of rollers, with a spring-loaded beveled or chamfered pin. (Tr. 125:20-21; 546-47.) Other general aviation manufacturers utilized rollers in the seat mechanisms. (Tr. 546.) Rollers present problems because they wear easily and there is more movement in the seat on the rail, thus creating a propensity for free-play and non-alignment. (Tr. 546:8-10.) The utilization of

the Teflon system assures proper alignment, and the beveling of the pin aids in the event of an actual misalignment. (Tr. 546-47.)

2. The 1968 Manual:

Because of the lack of any difficulties with the Musketeer seat system and because of the different manner in which it was designed, the original owner's manual (the 1968 manual) did not include a "position and lock" instruction. (Tr. 52:16-21; Exh. 26.) In 1979, the manual for the Musketeer was revised pursuant to a directive from the General Aviation Manufacturer's Association ("GAMA"). (Tr. 465:23-25.) The GAMA sought to standardize the manuals of various manufacturers so that a pilot could easily and safely switch from one brand of plane to another. (Tr. 406-407.) Some manufacturers, as noted above, had experienced seat system problems, and, thus, the "position and lock" command was included in the GAMA revised manual for standardization purposes even though Beech had experienced no problems with its seating system. (Tr. 467:9-17; 466:8-15; 465:23-25.)

3. Notice of Manual Change:

Notice of the revised manual was sent in a letter form to all individuals and entities on the "Owner Notification List" maintained by the FAA. (Tr. 397:8-17.) This is a list with the names and addresses of all registered aircraft owners. (Tr. 397:8-17; 400:7-11; Exh. 38.) Beech and other manufacturers use this list as a standard procedural method for mailing letters notifying owners that the manual has been revised. (Tr. 410-12; 400:7-11; 201:11-20.)

A notice letter was sent by Beech to a Mr. Brian Jordan, the then owner of the aircraft involved in the extant case. (Tr. 401:8-22; Exh. 39.) A short time later, a copy of the 1979 revised manual was sent to all current Musketeer owners, including Brian Jordan. (Tr. 401:6-7; 402:2-5.) A record was kept by Beech as to the letters that were sent out. (Tr. 400:22-25 to 401:1.) The District Court correctly instructed the jury to presume that the registered owner at the time of issuance received the 1979 manual. (Tr. 691:7-11.)

The letter to the registered owner referred to the outdated manual and stated: "It is essential that you familiarize yourself with the material contained in the revised handbook and keep this handbook with the airplane at all times." (D. Exh. 38; Tr. 410-12.) The letter further stated that it considered the revised manual to be the official document and that it had notified the FAA of its position. (Tr. 412:12-15.) The letter emphasized that the pilot is required to operate the aircraft in accordance with FAA approved data. (Tr. 412:19-21.)

Not only did the registered owner of the Musketeer in this case get a copy, but also one of the subsequent purchasers, Greg Young, received the revised manual. An "update card" from the 1979 manual, with the original owner's name typed on it, was actually sent to Beech sometime in September 1981. (Tr. 402:22-25 to 403:18-19.) The card listed the new owner, Greg Young. (Exh. 40.) There is no way the original owner (Bryan Jordon) and the subsequent purchaser (Greg Young) could have obtained the "update card" unless Jordan had actually received the revised manual and still possessed it at the time when the plane was sold. (Tr. 403-404.)

Young was one of the joint owners of the plane, along with Argubright, prior to the accident. (Tr. 404:9-11.)

4. Obligation of Owner and Pilot to Insure Current Manual:

It is the obligation of the owner and/or operators of aircraft to make sure the current manual is in the airplane. (Tr. 404:12-17; 435:2-3.) Beech tells pilots and owners how to keep their manuals up to date. (Tr. 440:11-12.) This is a responsibility imposed by law on pilots and owners. (Tr. 204-207; 440:15-20.) Section 91.31(b)(1) of Title 42 of the Code of Federal Regulations provides that no person may operate a U.S. registered civil aircraft "unless there is available in the aircraft a *current approved* Airplane . . . Flight Manual. . . ." (Emphasis added.)

Every pilot is under a duty to familiarize himself or herself with all available current information concerning that flight before beginning the flight. 42 C.F.R. § 91.5 (1979). Section 91.3 provides that the pilot in command has direct responsibility and is the final authority with respect to the operation of the aircraft. Plaintiffs' expert and numerous other witnesses testified that it is the duty of the pilot in command to find out if there is a more current manual and to obtain one. (Tr. 207:1-3; 504:3-8 to 506:1-20; 512:3-10.)

Current manuals are easy to obtain. (Tr. 395:3-7.) Beech issued a service instruction that included a list of all manuals currently published for Beech airplanes. (Tr. 395:8-17; D. Exh. 41.) This instruction gives all necessary pertinent information on current manuals. (Tr. 395:18-21.) The instruction is available at Beech

dealers, airports and FBO's and other such locations. (Tr. 395:22-24.) Plaintiffs' expert admitted that the manuals of the various general aviation aircraft manufacturers are readily available. (Tr. 85:19-25 to 86:1-3.)

5. The Accident:

On April 27, 1982, James L. Argubright and Peter J. Kerckhof, his flight instructor, were operating a Musketeer model B-23 at the Aero Valley Airport, near Roanoke, Texas. (Tr. 228:1-4.) They had safely taken off and landed a number of times earlier in the day. (Tr. 292:8-9.) At approximately 2:50 p.m., the airplane, after climbing on take-off approximately 100 feet above the ground, stalled, rotated, went into a spin and crashed. (Tr. 229:11-12; 235:14-22.)

6. Alternative Theories of Accident:

Petitioners state that it was "undisputed that the crash occurred because the Beech seat in which Argubright was sitting was not latched, and slipped back during take-off." (Petition at 3.) In fact, there were two theories as to how the accident occurred: (1) the seat was not positioned and locked prior to take-off, and (2) the seat was adjusted during the course of take-off. Petitioners' theory that the instructions were inadequate was based on the testimony of their expert, Donald Kennedy. This theory assumed that the seating system was defectively designed in that it was difficult to detect that the seat was unlatched. (Tr. 152:15-20; 153:7-10.) Plaintiffs' presented no evidence that there would be a duty to instruct to "position and lock" if there was in fact no defect in the

seating system. Moreover, Petitioners failed to establish a duty to instruct pilots not to adjust their seats in flight.

The jury concluded that the plane was in fact not defectively designed and thus it was not difficult to detect that the seat was not locked. (Tr. 195.) This fact, and the evidence of the physical operation of the plane, established that this case involved an in-flight seat adjustment. The evidence was clear that there would be no duty to warn a pilot not to adjust and lock his seat while in the course of taking off. (Tr. 195:23-25 – 196:1-4.) Petitioners' expert conceded that there was no physical evidence to indicate that an in-flight adjustment was not attempted. (Tr. 199:21-25.) He also conceded that the markings on the seat rail were equally consistent with both the Petitioners' and the Respondent's theories. (Tr. 200:2-8.) Finally, Petitioners' expert stated that he did not think "anybody has any physical evidence that it was one scenario or the other." (Tr. 200:9-13.)

7. Operation of Aircraft:

The testimony at trial revealed that it was not possible for the aircraft seat to have been unlocked and not moved fore and aft as the pre-flight checks and tests were conducted. Thus, the pilot and passenger would be immediately made aware of the fact the seat was unlocked by its physical movement. Mike McClure testified:

> There [are] all kinds of movement that he would . . . absolutely have to do before he ever got to the runway and took off. During that time I feel that the seat would have moved if he had started with it on top of the rail and the pin would have dropped in a hole. I find it totally absolutely unfathomable that he

> took off in the airplane with that pin riding on that rail.

(Tr. 388-89.) The pilot's movements prior to take-off include: (1) pushing and working the rudder pedals, (2) pulling and pushing on the yoke, and (3) applying the brakes. (Tr. 389-91.) Moreover, going down the runway is not gentle; there is a lot of movement because of bouncing and bumping of the plane on the runway. (Tr. 391-92.) Three other expert witnesses testified that the preflight maneuvers are such that it was physically impossible for Argubright to have left his seat unlocked *prior* to takeoff without noticing it was unlocked. (Tr. 468-73; 503; 551-55.)

B. REASONS FOR DENYING THE WRIT

1. The Issues are Not Important:

Neither the factual nor legal issues presented by the petition merit the granting of a writ of certiorari in this case. This is a diversity case in which the Fifth Circuit was called upon to determine the applicable Texas law and to apply that law to the facts before it. It did this. Petitioners disagree with the result and that is the sole basis for their Petition for Writ of Certiorari.

Contrary to Petitioners' assertions, the Fifth Circuit has not "exempted" an industry from following important safety factors nor has it eliminated the need for warnings recommended by the GAMA. In fact, the GAMA recommendations were incorporated in the Musketeer instruction manual and were in fact provided to one of the co-owners of the aircraft with Mr. Argubright. Moreover, the record establishes that the warning to

position and lock was not one that was needed with respect to the aircraft involved in this case. While some manufacturers have had problems with a true defect involving a true design and manufacturing defect involving seat slippage, the Musketeer aircraft involved in the present case has never experienced any such problems, and, thus, there was no need to warn of this in the aircraft in question. One opinion dealing with the one accident in the approximately twenty-five years of safe operation of Musketeers is simply not going to set a long-standing precedent applicable to numerous future cases.

The opinion issued by the court of appeals speaks solely to the facts before it. It sets no special broad standard or rule of law that is to be blindly applied to every manufacturer. If the issues were as significant as Petitioners suggest, then this Court must ask why no attempt was made to have the legal questions certified to the Texas Supreme Court pursuant to Tex. R. App. P. 114. This Court is being asked to do that which Petitioners could have had the Texas Supreme Court do. Petitioners cannot show a societal or legal concern sufficient to justify further review of the facts and the law in this case.

2. Alternative Bases Support the Fifth Circuit's Decision:

Respondent asserted multiple, alternative bases for the reversal of the judgment below. The Fifth Circuit addressed only one of these bases, holding that the "jury could not have reasonably determined that Beech should reasonably have anticipated that student pilots would position their seat but fail to lock it prior to takeoff." The

additional bases are as follows: (1) Beech had no duty to instruct because there was no evidence of a "seat slippage" problem with this particular type of aircraft or that Beech had knowledge of an unreasonable risk of harm as to the seat system; (2) the accident was the result of an in-flight seat adjustment, and because such action would be (in the words of Petitioners' expert) "irrational" and violative of "common sense," Beech had no duty to instruct as to in-flight adjustment; and (3) the inclusion of the "position and lock" instruction in the 1979 revised manual satisfied any duty Beech may have had. Thus, in addition to the fact-sensitive points already presented by Petitioners, the alternative bases will have to be addressed and the evidence in connection with those issues reviewed if writ is granted in this case.

3. The Decision Complies with *Erie* and Correctly States Texas Law:

Petitioners urge that the Fifth Circuit failed to follow *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and that the court supposedly misstated Texas law with respect to when there is a duty to warn. The federal courts in diversity cases are "bound to construe Texas law in the same way that its courts would if confronted with the same issues. . . ." *In re: Air Crash at Dallas/Fort Worth Airport*, 856 F.2d 28, 30 (5th Cir. 1988). In diversity cases where state law is silent on the issue presented or where "pinpoint" state law is absent, federal courts, sitting as a state trial judge, must endeavor to apply law which [it] believes the state's highest court would declare if it had the opportunity to do so in the case at hand." *Crutinger v. Hess*, 408 F.Supp. 548, 554

(D. Kan. 1976). That is precisely what the Fifth Circuit did in the present case.

a. The Nature of the Court's Decision:

The Fifth Circuit held that "[p]roduct liability doctrine governing the manufacturer's duty to warn is well settled in Texas." 868 F.2d at 766. The court further stated that "there is no duty to warn of dangers obvious to the user of the product." *Id.* The court concluded that the question of whether there is a duty to warn and the adequacy of the warnings given "must be evaluated in connection with the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product as it proceeds along its intended marketing chain." *Id.* These statements of "well-settled" Texas law are entirely correct.

b. Comparative Causation – False Conflict:

Petitioners erroneously assert that the holding of the Fifth Circuit involved some type of "no duty" concept that has been eradicated by the adoption of comparative causation. (Petition at 7.) Under Petitioners' interpretation of the law, there would be no need to ask liability issues dealing with the duty to instruct or the adequacy of the instructions because the jury's only task under the Petitioners' interpretation of Texas law is to compare the conduct of the various actors and determine the applicable percentages of causation. (Petition at 7.)

Petitioners have obviously attempted to fashion a "false conflict" between the decision of the Fifth Circuit in this case and that of the Texas Supreme Court in *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 428-38 (Tex.

1984). The decision in *Duncan* does not address the issues involved in the present case. It certainly does not abolish the need to establish liability as a predicate to comparison. It cannot be seriously argued that this absurd notion is one the Texas Supreme Court would be likely to follow.

c. Numerous Decisions Applying Texas Law Are In Accord:

The decision of the Fifth Circuit in the present case, as well as those decisions cited in the opinion, correctly reflects Texas law. In *Middleton v. Harris Press & Shear, Inc.*, 796 F.2d 747, 751 (5th Cir. 1986), the court stated:

> Whether there is a duty to warn and the adequacy of a warning given must be evaluated in connection with "the knowledge and expertise of those who may reasonably be expected to use or otherwise come in contact with the product as it proceeds along its intended marketing chain."

Id. (citing *Martinez v. Dixie Carriers, Inc.*, 529 F.2d 457, 465-66 (5th Cir. 1976)). *See Koonce v. Quaker Safety Products & Mfg.*, 798 F.2d 700, 716 (5th Cir. 1986) (noting this rule was supported by *Ragsdale Bros., Inc. v. Magro, rev'd o.g.*, 721 S.W.2d 832 (Tex. 1986)).

In a diversity case, the court is bound to adhere to decisions of the state intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise. *Peoples Bank v. Polk County v. Roberts*, 779 F.2d 1544, 1545 (11th Cir. 1986). The rule of law stated in the prior Fifth Circuit decisions cited by that court in its opinion in the

present case was adopted by the Texas court of appeals in *Pearson v. Hevi-Duty Elec.*, 618 S.W.2d 784, 787 (Tex. Civ. App. – Houston [1st Dist.] 1981, writ ref'd n.r.e.), wherein the court stated: "The adequacy of a warning cannot be evaluated apart from the knowledge and expertise of those who may reasonably be expected to use the product." *Id.* (citing *Martinez, supra*; *Helene Curtis Indust. v. Pruitt*, 385 F.2d 84 (5th Cir. 1967), *cert denied*, 391 U.S. 913 (1968).) The same rule was followed by another Texas court of appeals in *Lopez v. Aro Corp.*, 584 S.W.2d 333, 336 (Tex. Civ. App. – San Antonio 1979, writ ref'd n.r.e.). Finally, even one of the leading commentators on Texas products liability law agrees that the Fifth Circuit has correctly stated the law in Texas. Sales, *Product Liability Law in Texas*, 630-31 (1984).

d. *Magro* in Accord.

Contrary to Petitioners' suggestion, the decision in *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 836 (Tex. 1986), has simply nothing to do with the issues in the present case. The court merely held that it was not an abuse of discretion for the trial court to refuse an "expert user" instruction. *Id.* The court's limiting of available jury instructions was part of the court's efforts to avoid the charge from being used as a repository for legally correct statements of the law that tend to indirectly relate to the specific questions posed to the jury. *Id. See First Int'l Bank v. Roper Corp.*, 686 S.W.2d 602, 604 (Tex. 1985).

The court of appeals in *Ragsdale Bros., Inc. v. Magro*, 693 S.W.2d 530, 536 (Tex. App. – San Antonio 1985), *rev'd o.g.*, 721 S.W.2d 832 (Tex. 1986), recognized, as did the court in this case, that "generally no duty to warn exists

when the danger or the potentiality of danger is obvious or actually known to the injured person." The later statements of the court about use with knowledge of the danger being subsumed within assumption of the risk are related solely to the facts of that case. In that case there was extensive evidence that warnings should have been given that would have prevented the accident. 721 S.W.2d at 833. The plaintiff therein testified that in his training he had never in fact received such instructions. *Id.* This is simply not the record presented here. Not surprisingly, the discussion of the lower court in *Magro* was in no way adopted or approved by the Texas Supreme Court's opinion in that case.

e. Rule of *Parker* Does Not Negate Need to Prove Duty To Warn:

Petitioners' attempt to place this case in the "no duty" line of cases, such as *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (1978) (rejecting the "open and obvious" defense in the premises negligence cases), is unpersuasive. Petitioners ignore the fact that their own evidence had to establish a legal duty to instruct and that the instructions given were inadequate. In *Bryant v. Gulf Oil Corp.*, 694 S.W.2d 443, 446 (Tex. App. – Amarillo, 1985 no writ), the court explained:

> It is axiomatic that in order to establish tort liability on the part of a defendant, a plaintiff must prove the existence and violation of a legal duty owed him by that defendant . . . That basic concept was not changed by the court's decision in *Parker* . . . Prior to *Parker*, a plaintiff was not only required to establish a duty owed and violation of that duty by a defendant but he must additionally "prove the

> absence of his own subjective knowledge and appreciation of any danger," *i.e.*, to negate "no duty." The *Parker* court abolished the additional requirement but did not change the underlying obligation to establish a duty on the party of the defendant and a violation of that duty.

Id. Accord Herring v. Hathcock, 643 S.W.2d 235, 237 (Tex. App. – El Paso 1982, writ ref'd n.r.e.).

The Fifth Circuit Court of Appeals adopted the same approach in *Middleton*, one of the cases cited in support of its decision in the present case. In *Middleton*, the same "no duty" argument was made. The court, discussing later Texas Supreme Court authority, stated:

> The no-duty rule was characterized by the Texas Supreme Court in *Dixon* [*v. Van, Waters & Rogers*, 682 S.W.2d 533 (Tex. 1984)] as an "oddity" that placed the burden on the plaintiff to "negate his own knowledge and his own appreciation of a danger." 682 S.W.2d at 533. However, the abolition of this rule did not effect the substantive standards governing the existence of a duty to warn. As stated in *Dixon*, "[a] plaintiff [no longer has] the burden to prove and obtain findings that he lacks knowledge and appreciation of a danger; he must, however, prove the defendant had a duty and breached it." 682 S.W.2d at 534.

796 F.2d at 751. The court concluded that the determination of whether there is in fact a duty to warn in the first instance and whether the warnings were adequate must be evaluated in connection with the knowledge and expertise of the persons reasonably expected to use and come in contact with the product. *Id.*

f. Arguments Not Timely and Properly Raised Below:

The Petitioners present legal arguments were expressly articulated for the first time on rehearing. They were not raised in response briefs in the trial court or in the principal briefs to the court of appeals. Further, Petitioners never asked the Fifth Circuit to certify this issue to the Texas Supreme Court. Tex. R. App. P. 114. Petitioners did not even suggest the case should be reheard en banc, which was the only way the prior decisions of other panels could have been rejected by the panel in this case. Fed. R. App. P. 35(a). It cannot be said that the panel of the Fifth Circuit erred in following its prior decisions when procedurally Petitioners gave it no option but to follow those decisions. *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976) (holding that "[o]ne panel . . . cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent" absent en banc consideration).

g. Knowledge of User Must be Considered:

Petitioners contend that the expertise and knowledge of the user of the product cannot be looked at when the user is a "beginner." (Petition at 9.) This argument is completely contrary to well-established products liability law in Texas. In fact, it is contradicted by the very authorities cited by Petitioners. *Pearson*, 618 S.W.2d at 787.

Under Texas law, it is incumbent upon the plaintiff to establish that the manufacturer could anticipate that the product would become unreasonably dangerous if the

consumer or user is not warned or instructed in connection with the danger. *Id.* at 788. Obviously, the knowledge or expertise of the user, whether he is a beginner or a true expert, must be examined in determining if this test is met. It must also be examined in determining the adequacy of the instructions that are given. *Id.* at 787. In other words, given the state of knowledge of a pilot in the position of Mr. Argubright, the instructions given in the 1968 manual, which it did not include an instruction to "position and lock," were adequate.

The decision of the Fifth Circuit in *Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338-39 (5th Cir. 1984), is instructive of the error in Petitioners' arguments. The court in that case noted the fact that the adequacy of a warning must be evaluated in light of the knowledge of the ultimate users of the product. *Id.* at 338. Thus, where the product is marketed to professionals or experts, the manufacturer is entitled to "rely on the knowledge which a reasonable professional would apply in using the product." *Id.* The court further stated that when the product is manufactured to the general public, "the manufacturer must tender the warning to the man-in-the-street . . . ." *Id.* at 338-39. The court recognized that under both the circumstances of an expert user and a non-expert user, the knowledge of the user is to be examined *Id.*

The court in the present case expressly held that the danger associated with failing to position and lock the seat was something that was "obvious to pilots, even to novice pilots acting under the direction of a flight instructor." 868 F.2d at 767. Thus, the court tailored its holding to the specific type of user before it. The same was not

done by the trial court in *Pavlides*, and the Fifth Circuit Court of Appeals in that case appropriately reversed the holding of the trial court. *Id.* at 339.

Two other decisions cited by Petitioners do nothing to support their arguments. In *Lopez v. Aro Corp.*, 584 S.W.2d 333, 336 (Tex. Civ. App. – San Antonio 1979, writ ref'd n.r.e.), the court of appeals once again recognized the very rule that Petitioners claim is not the rule in Texas: the adequacy of a manufacturer's warning must be evaluated in light of the knowledge or expertise of those who could reasonably be expected to use the product. *Id.* at 336. The case in no way limits this evaluation to situations where the user is an expert. The decision in *Hamilton v. Motor Coach Indust., Inc.*, 569 S.W.2d 561 (Tex. Civ. App. – Texarkana 1978, no writ), has even less to do with the present case. There was no direct discussion of the issues presented as to the scope of knowledge or expertise that can be evaluated.

h. Petitioners' Arguments Defy the Logic and Policy of Products Liability Law:

There are distinct and important policy reasons behind the rule that the knowledge and experience of the user must be analyzed in determining if there is a duty to warn and whether the warning or instructions are adequate. If the law required manufacturers to instruct all users, even those possessing knowledge of the danger of a product, of all obvious dangers inherent in a product, "the list of foolish practices warned against would be so long, it would fill a volume." *Kerr v. Koemm*, 557 F.Supp. 283, 288 n.2 (S.D. NY. 1983). Indeed, the courts have recognized that it would be "totally unreasonable" to

require manufacturers to warn or protect against every injury that might result from the use of their products. *Borowicz v. Chicago Mastic Co.*, 367 F.2d 751, 760 (7th Cir. 1966). The rule of law suggested by Petitioners ignores these policies. Under Petitioners' interpretation, a manufacturer of knives would have to warn of their sharpness and a manufacturer of alcoholic beverages would have to warn of the products' intoxicating propensities. This is not a rule that Petitioners' can seriously urge would be adopted by the Texas Supreme Court.

i. Argubright Was Not a Mere Child:

The Fifth Circuit made clear that "the danger of an unlocked seat [that] could slide back, making it difficult or impossible to operate safely, or even to reach, those controls, is open and obvious to any reasonable driver." 868 F.2d at 767. Mr. Argubright was hardly the equivalent of a child learning to drive, as is suggested by Petitioners. The record reveals that Argubright started flying at age 15 and received a license at age 16. (Tr. 309; 314:16-18; 347:11-14.) He flew on and off for a number of years. (Tr. 314:19-20.) He even took additional flight training for several months in 1970. (Tr 347:20-22.) Argubright took ground school with his son in 1982. (Tr. 315:8-11.) He had begun to take flying lessons again prior to this accident. (Tr. 315:14-23.)

Petitioners make no mention of the fact that Argubright, as a part owner in the aircraft in question (Tr. 348:15-21), had a duty under FAA regulations to maintain a current manual. Indeed, as the Fifth Circuit correctly recognized, the flight manual available at the time of the accident, which was provided to one of his co-

owners, clearly included the very instruction that Petitioners claim was required. Regulations having the force of law make it a pilot's duty, before commencing a flight, to familiarize himself with all available information concerning the flight. *Brooks v. United States*, 695 F.2d 984, 990 (5th Cir. 1983); *Crossman v. United States*, 378 F.Supp. 1312, 1318 (D. Or. 1974).

j. Fifth Circuit Properly Determined Texas Law:

The *Erie* determination made by the Fifth Circuit was supported by Fifth Circuit case authority that has been cited by the Texas courts as authoritative under Texas law. *Pearson, supra; Lopez, supra.* Moreover, the decision of the court is consistent with the majority rule in other jurisdictions. *See, e.g., Jacobsen v. Colorado Fuel & Iron Corp.*, 409 F.2d 1263 (9th Cir. 1969) (no duty to warn that cable might snap in a tightening device); *Hopkins v. Ei DuPont de Nemours & Co.*, 212 F.2d 623 (3rd Cir. 1954) (dynamite manufacturer had no duty to warn of danger of premature explosion of dynamite placed in newly drilled hole before allowing heat caused by drilling to escape); *Dowdy v. Santa Fe Marine, Inc.*, 698 F.2d 232 (5th Cir. 1983) (operator of lifeboat was familiar with danger of prematurely pulling release lever); *Posey v. Clark Equip. Co.*, 409 F.2d 560 (7th Cir.), *cert denied*, 396 U.S. 940 (1969) (manufacturer of forklift truck designed without overhead guard had no duty to warn of dangers posed by falling objects as danger was generally owned and appreciated and is obvious to anyone, particularly forklift's operator).

4. The Decision Complies with the Seventh Amendment:

Petitioners assert that the Fifth Circuit's analysis of the evidence violated their Seventh Amendment rights. Petitioners do not specifically point out any aspect of the opinion that violates the applicable standard of review. Furthermore, the discussion of the evidence presented by Petitioners is incomplete and out of context.

a. Compliance with Standard of Review:

Petitioners suggest that appellate review of the sufficiency of the evidence to support the verdict is simply never available. To the contrary, the courts are clearly allowed to re-examine the evidence according to the rules of the common law to determine whether there was any competent and substantial evidence in the record which fairly tends to support the verdict. *Mortensen v. United States*, 322 U.S. 369, 374 (1963); *Wood v. Diamond M. Drilling Co.*, 691 F.2d 1165, 1168 (5th Cir. 1982). "The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944). "A verdict cannot stand without an evidentiary basis, and a verdict entered absent sufficient evidence . . . poses an error of law reversible under common law without a constitutional dilemma." 1 Childress, *Standards of Review*, § 3.1, at 154 (1986).

The Fifth Circuit correctly concluded that reasonable minds could not differ that an individual with Argubright's knowledge and experience had to know, without the need for further instruction, that the seat had to be

positioned and locked prior to take-off. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th cir. 1969) (en banc). This issue of the duty to instruct was thus a question of law based on the evidence presented.

b. Petitioners' Review of Evidence Ignores Likelihood:

The fundamental misconception in Petitioners' analysis of the evidence is that in determining whether there was a duty to instruct, they look only to the Respondent's possible knowledge of a particular danger. Petitioners entirely disregard the undisputed evidence that there was no likelihood of the danger resulting in an accident. While the danger or harm that could result in the failure to "position and lock" prior to take-off is "obvious," it was not a risk of harm that was so likely or probable to occur from the standpoint of the manufacturer as to permit the imposition of a duty to instruct. There are any number of obvious dangers involved with the operation of an airplane, but where they are not likely to occur and they are not reasonably foreseeable, there is no duty to instruct. A manufacturer need not instruct as to every danger; it need only instruct or warn if it has knowledge of an *unreasonable risk* of harm.

c. No "Seat Slippage":

Petitioners' misconception is made evident by their reference to the testimony of Mike McClure. (*See* petition at 12-13.) McClure testified:

> Q. But we know that it is foreseeable that seat slippage can occur in a moveable seat?
> A. Maybe you know that but I don't know that.

(Tr. 420-21.) Petitioners incorrectly assert that this testimony proves that the danger of seat slippage was not something that was known to the average user of the aircraft.

First, the question asks if seat slippage was foreseeable by the manufacturer. The testimony in no way suggests that the failure to position and lock the seat was not an obvious danger from the perspective of the user of the aircraft. Second, the fact that a manufacturer has never experienced any problems with "seat slippage" in its seats and has never had any problems with pilots failing to adjust their seats (and not recognizing it prior to takeoff) or attempting to adjust their seats in flight is further evidence that pilots do in fact know how to operate the seat systems in the plane safely. Third, the testimony deals with "seat slippage," which is a defect in connection with the manner in which the seat is designed or manufactured; in other words, the seat is prone to involuntarily slip. There was no evidence in this case, and the jury accordingly found, that there was no defective design with respect to the seat system.

Interestingly, the portion of the record cited as supporting the proposition that not every pilot knows to check and lock his seat is decidedly inconclusive, speculative, and internally inconsistent. (Tr. 154.) This testimony does not deal objectively with what a pilot such as Mr. Argubright *should have known*. It does not consider his duty to have a current manual. It does not consider that the manual was properly sent in this case. Moreover, this testimony was based on the assumption that there was a defective design in the seating system that would make it difficult to detect if the seat was

unlatched; thus, if a pilot failed to latch the seat prior to take-off, he would not be able to determine it until the plane was ascending. This was the linchpin of the testimony of the very expert witness in question. (Tr. 152:15-27; 153:7-10.) Interestingly, an additional reference made by Petitioners to the record reveals that the danger perceived by Petitioners' expert was involved with other aircraft that used a roller seating system, which was entirely different from that used in the Musketeer aircraft. (Tr. 210:12-15.) Furthermore, the expert also testified on this same page of the record that he had in fact sought to determine if there had been prior accidents involving the Musketeer seat system; he had to admit that he had completely failed to find any prior allegations or accidents. (Tr. 210-11.)

5. The Fifth Circuit Made No Material Misstatement of the Facts:

The Petitioners recite five alleged "factual misstatements" in the Fifth Circuit's opinion. These complaints amount to nothing more than quibbling with statements that were not material to the resolution of the case below. Certainly, they do not amount to a justification for this honorable Court having to spend its valuable time re-reviewing the no evidence and substantive Texas tort law points presented in this case.

First, the Fifth Circuit stated that the jury found that the seat mechanism was not defectively designed. There is no question that the jury rejected the Petitioners' design defect theory. The jury cannot be said to have rejected the seat-slippage defect theory in one question and then used that rejected theory as the alleged known,

unreasonable risk of harm serving as the basis for a duty to instruct in answering the failure to instruct question.

The jury was imminently correct in rejecting the slippage theory. There was no evidence presented at trial that would support a finding of defective design. The existence of a design defect was an essential element of the duty to instruct sought to be imposed by Petitioners' expert. Thus, absent evidence of a defective design, there was no duty to instruct. The semantic complaint made by Petitioners is of no legal significance.

It is true that the basis of liability in this case was a strict liability theory based on failure to instruct. Under Texas law, negligent failure to instruct and failure to instruct on a strict liability basis are difficult, if not impossible, to differentiate. Certainly, there is no difference in the elements that are the subject of the Fifth Circuit's finding that there was no duty to instruct in this case. Indeed, Petitioners do not point to any difference.

The Fifth Circuit noted the fact that the jury found that Beech failed to "instruct as to the pre-flight checklist . . . ." This was in fact the theory of Petitioners' case. Petitioners did urge that placards and other devices could have been used to provide the instruction as a rejoinder to Respondent's argument that the provision of the revised manual, which included the position of the lock instruction, was sufficient to satisfy any duty it had. There was in fact no substantial evidence that these methods of providing revisions to the manual were any more precise than that actually used. Indeed, the evidence showed that they were less likely to provide the needed instruction than the actual method used. In any

event, the fact that the "failure to instruct" was "generic" is a distinction without a difference.

With respect to the comparative findings, the Fifth Circuit stated that the jury "assessed 30% comparative negligence against Argubright alone . . . ." It is true that the issue submitted to the jury was a "comparative causation" issue; it is equally true that the basis for comparison between Argubright and Beech involved Argubright's negligence and Beech's strict liability. Again, this semantic distinction is of no factual or legal significance in the present case.

The most glaring error in Petitioners' discussion of the Fifth Circuit's opinion is in connection with the Fifth Circuit's statement that the revised checklist "was sent to and received by owners of the aircraft involved in Argubright's crash." Petitioners urge that this statement is incorrect. In fact, the record revealed that the manual was sent to and received by the owner of the plane at the time of the update, and that in fact the manual made its way into the hands of two subsequent owners of the aircraft, Charles Thomas, and Greg Young in September of 1981. (Tr. 403-404.) The jury was even instructed that it was to be presumed that the registered owner of the aircraft "at the time the 1979 revised operator manual was issued, received the 1979 revised operator manual from Beech." (Tr. 691:7-11.) The evidence further established that an update card from the back of the 1979 revised manual was sent to Beech and that it was signed by George Young, one of the joint owners of the plane with Mr. Argubright prior to the time of the accident. (Tr. 404:9-11.) Thus, Petitioners' assertion that a *previ-*

ous owner received the manual, not one of the present owners, is simply incorrect.

Petitioners also urge that the Fifth Circuit was incorrect in that it did not note that the revised checklist was not in the plane and there was no evidence that it had ever been in the plane. This is a fact that goes again the position of the Petitioners, not the opinion of the Fifth Circuit. It was incumbent upon Petitioners to prove that they had not received the revised manual. The only proof on this point was that the manual was not in the plane at the time of the accident. There was clearly the possibility that it could have been received and either misplaced, lost, or simply ignored by Mr. Argubright. In any event, Mr. Argubright was duly obligated under the regulations of the FAA to have a current approved flight manual in the plane. (Tr. 204-207; 440:15-20.) 42 C.F.R. 91.31(b)(1).

Finally, the statement of the Fifth Circuit that the Petitioners' reliance on checklists undermined their contention that an additional warning was necessary is entirely correct. As already noted above, it is the duty of the pilot operating an aircraft such as that involved in the present case to obtain a current manual. The current manual contained the very checklist items that Petitioners contend should have been in the manual. Even if for some reason the manual was not in the plane at the time of the accident, Argubright had a duty to have it in the plane.

The Fifth Circuit's analysis of this case from a legal and factual standpoint was correct. The Petitioners have pointed out errors in semantics but not errors of a material legal or factual nature. In any event, as Petitioners

admit, not all of the alleged factual misstatements were even presented in their Motion for Rehearing to the Fifth Circuit.

C. CONCLUSION

The decision of the Fifth Circuit correctly determined Texas law under *Erie*. Petitioners' arguments disagree with the Fifth Circuit's determination under *Erie*. Petitioners, however, do not present arguments that reflect that the manner in which the determination was made was in violation of the rules set forth under *Erie*. In addition, the decision of the Fifth Circuit was in complete compliance with the dictates of the Seventh Amendment. Petitioners are in effect asking this Court to utilize discretionary review in virtually every civil personal injury case presented to a federal circuit court of appeals. Petitioners have wholly failed to establish any error in the application of the accepted standards of review dictated by the Seventh Amendment and therefore fail to present to this court an issue of constitutional dimensions. The Petition of Writ of Certiorari should therefore be denied.

Respectfully submitted,

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